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Supreme Court, U.S.
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No. 86-_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

BAILUS WALKER, JR., MAURICE S. REIZEN, M.D., HERMAN A. ZIEL, M.D., RICHARD REIHMER,

Petitioners,

v

HURON VALLEY HOSPITAL, INC., a Michigan nonprofit corporation, and MARTIN L. TREPEL, D.O.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

IS A PRETRIAL ORDER DENYING A MOTION TO DISMISS A FEDERAL SHERMAN ACT CLAIM UNDER THE STATE-ACTION ANTITRUST IMMUNITY DOCTRINE A FINAL DECISION WITHIN THE MEANING OF 28 USC § 1291 AND THUS IMMEDIATELY APPEALABLE?

PARTIES BELOW

Petitioner Maurice Reizen, M.D., was the Director of the Michigan Department of Public Health between 1970-1981; Bailus Walker, Jr., was Director of Michigan Department of Public Health from 1981-1983; Herman Ziel, M.D., was Chief of the Bureau of Health Facilities between 1966-1984; Richard Reihmer was Chief of the Division of Health Care Facility Planning & Construction at Michigan Department of Public Health, 1969-1978.

The Michigan Department of Public Health (MDPH) was originally named as a Defendant but by stipulation was dismissed from the suit in exchange for MDPH's recommendation for approval for federal capital expenditure reimbursement under 42 USC § 1320a-1 (§ 1122 of Social Security Act amendments of 1972).

Parties also named as Defendants in this suit, but which are not involved in this appeal:

> City of Pontiac, City of Pontiac Hospital Building Authority, Pontiac Osteopathic Hospital, Crittenton Hospital, Sisters of Mercy Corporation, Comprehensive Health Planning Council of Southeastern Michigan, North Oakland County Planning Steering Committee, United States Department of Health and Human Services, Margaret Heckler, Paul Masseron, and Terence E. Carroll.

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No. 86-_____

In The

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BAILUS WALKER, JR., MAURICE S. REIZEN, M.D., HERMAN A. ZIEL, M.D., RICHARD REIHMER,

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v

HURON VALLEY HOSPITAL, INC., a Michigan nonprofit corporation, and MARTIN L. TREPEL, D.O.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The District Court decision, reported at 612 F Supp 654 (ED Mich, 1985) also appears in the appendix hereto.

JURISDICTION

The Court of Appeals judgment was entered on May 30, 1986. Petitioners seek review of the judgment under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES ADMINISTRATIVE RULES, POLICY DIRECTIVES, AND COURT RULES INVOLVED

28 USC § 1291:

"The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

The following statutory provisions are included in Appendix:

Certificate of Need Law, 1972 PA 256; MCLA 331.451, *et seq;* MSA 14.1179(51), *et seq,* as amended by 1975 PA 171.

Michigan Hospital Survey and Construction Act, 1947 PA 299; MCLA 331.501, *et seq;* MSA 14.1201, *et seq.*

STATEMENT OF THE CASE

Petitioners were state government officials who were sued[1] on November 15, 1983 in a Sherman Act and Civil Rights (42 USC § 1983) amended complaint alleging they as early as April, 1976 conspired to adopt anticompetitive policies in the course of their legislatively delegated duties of administering the State of Michigan's Certificate of

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[1] Plaintiff named Petitioners for the first time in an amended complaint filed November 15, 1983 in the United States District Court for the Eastern District of Michigan. Plaintiff filed its original complaint in that court on November 16, 1983.

Need Law.[2] The petitioners are alleged to have conspired for the purpose of preventing new competitive hospitals from entering the acute care hospital markets, and thus preserving markets for existing hospitals. They are alleged to have accomplished this by conspiring with other hospitals by denying to Respondent a Certificate of Need (CON).

Before the amended complaint in the federal lawsuit was filed, Respondent hospital appealed the CON denial in state administrative proceedings. The denial was affirmed on *de novo* review by the Michigan State Health Facilities Commission. Respondent then appealed, as permitted under Michigan's Administrative Procedures Act, to the state Circuit Court, which reversed the Commission and held that the standards which preferred existing facilities (the anticompetitive policies) had not been formally promulgated as rules by Petitioners in conformity with the State's Administrative Procedures Act and thus constituted an abuse of discretion.[3] On appeal to the State Court of Appeals, this decision was affirmed and leave to appeal

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[2]

Act 256, PA 1972; MCLA 331.451, *et seq.;* replaced by Part 21, Michigan Public Health Code. This statute forbade any hospital from being constructed, converted, added to, or modernized unless a documented need for the health facility was documented. MCLA 331.454; MSA 14.1179(54). Permission was required of Petitioners who decide to grant or deny a Certificate of Need. See MCLA 331.454; MSA 14.1179(54). Among the statutory criteria examined by Petitioners was what impact any construction would have upon existing facilities in the relevant area. See, MCLA 331.455a; MSA 14.1179(55a).

[3]

Petitioner Bailus Walker, Jr., was not a party to that state case, inasmuch as he did not become Director of the Michigan Department of Public Health until after the case was submitted to the Court of Appeals.

was denied by the Michigan Supreme Court.[4] The Court ordered the Director of the Michigan Department of Public Health to issue a Certificate of Need to Respondent, which was done.

Petitioners were added to the federal lawsuit by amended complaint in November, 1983 and moved to dismiss under Fed.R.Civ.P. 12(b)(6), contending, among other reasons, that they were immune from suit because of the state action doctrine of *Parker* v *Brown*, 317 US 341; 63 S Ct 307; 87 L Ed 315 (1943), and its progeny, and qualified immunity of governmental officials from 42 USC § 1983 suits. The District Court denied Petitioners' motion from which they appealed to the Sixth Circuit Court of Appeals. In an opinion entered May 30, 1986, the Sixth Circuit panel concluded that qualified immunity is not available to these state officers, and that the State Action antitrust immunity decision is not a final collateral order appealable under 28 USC § 1291. The issue of the appealability of the state-action antitrust immunity question was neither briefed nor argued by either party in the Court of Appeals below.

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[4]

Huron Valley Hospital v *State Health Facilities Commission*, 110 Mich App 236; 312 NW2d 422 (1981); *lv den*, 413 Mich 853 (1982).

REASONS FOR GRANTING THE WRIT

I.

A PRE-TRIAL ORDER DENYING A MOTION TO DISMISS A SHERMAN ACT CLAIM UNDER THE STATE-ACTION ANTITRUST IMMUNITY DOCTRINE IS A FINAL DECISION WITHIN THE MEANING OF 28 USC §1291 AND IS IMMEDIATELY APPEALABLE.

If the state-action immunity doctrine applies to the conduct of Petitioners, they are immune from Respondents' antitrust claims. Where, as here, the activity of state officials is carried out pursuant to state authorization, the antitrust immunity analysis requires a determination whether "the anticompetitive conduct of the State's representative was contemplated by the State." *Hoover* v *Ronwin*, 466 US 558, 568; 104 S Ct 1989; 80 L Ed 2d 590 (1984). In *California Retail Liquor Dealers Association* v *Mid-Cal Aluminum*, 445 US 97; 100 S Ct 937; 63 L Ed 2d 233 (1980), which was cited by both the Court of Appeals and District Court, this Court sets forth a two-prong test for determining whether state regulation of private parties is shielded from the federal antitrust laws. That test requires a determination whether the challenged restraint is clearly articulated and affirmatively expressed as state policy and whether the State actively supervises any private anticompetitive conduct. When applied to the conduct of state officials, however, the formulation of the test in *Mid-Cal Aluminum* appears to (may) be no different than the formulation enunciated in *Hoover* v *Ronwin*.

In *Town of Hallie* v *City of Eau Claire*, 471 US ____; 105 S Ct ____; 85 L Ed 2d 24, 32-33 (1985), this Court said that with respect to a municipality, the "clearly articulated and

affirmatively expressed" requirement was satisfied by state statutory provisions which showed that the legislature contemplated the kind of activity complained of, even though the statutes did not expressly mention anticompetitive conduct, but merely delegated authority to take action that foreseeably would result in anticompetitive effects. Surely no more stringent test should be applied when evaluating the conduct of state officials. *Hallie* also held that because there is no danger of involvement in *private* anticompetitive arrangements, the active state supervision requirement should not be imposed when the actor is a municipality and the Court strongly suggested that this requirement would not be imposed when the actor is a state agency. 85 L Ed 2d at 34, fn 10.

Petitioners contend that the denial of a state officer's motion to dismiss on grounds of state-action antitrust immunity in a Sherman Act claim is a final decision appealable under the collateral order doctrine enunciated in *Cohen* v *Beneficial Industrial Loan Corp.*, 337 US 541; 69 S Ct 1221; 93 L Ed 1528 (1949), and its progeny. Significant policy considerations are at stake. State officials like Petitioners ought to know when they undertake the large responsibility of running a state department, whether their decisions in the course of their duties, rightly or wrongly made, and subject to review by state appellate mechanisms, can later become the basis of Sherman Act claims in Federal Court. When they seek to have such claims dismissed because of state-action immunity, they ought to know whether they can obtain immediate appellate review in order to avoid the burden, expense and substantial interference in state administrative processes that such lawsuits involve.

The elements of the *Cohen* collateral order test are:

1) The order must resolve an important issue completely separate from the merits of the action

2) The order must conclusively determine the disputed question; and

3) Be effectively unreviewable on appeal from a final judgment.[5]

An appeal from the denial of a motion asserting the state-action antitrust immunity doctrine meets the requirements of the *Cohen* collateral order doctrine test. The state-action antitrust immunity doctrine, first of all, is separate from the merits of the case since a court is not required to determine the truth of a conclusory allegation of conspiracy. All the facts asserted in the Respondent's antitrust complaint relate to state officials' conduct in their official capacity and thus the only legal issue is whether such conduct is that of the State. Whether the state legislature contemplated that state officials were to apply the state law here involved (Certificate of Need law) in an anticompetitive manner can be resolved by examination of the statutory plan itself. Even if certain factual considerations must be examined, the case is still reviewable at this time. This Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test, even though a reviewing court must consider the Plaintiff's factual allegations in resolving the immunity issue.[6]

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[5]

Firestone Tire and Rubber Co. v *Risjord*, 449 US 368, 375; 101 S Ct 669; 66 L Ed 2d 571, 579 (1981).

[6]

Mitchell v *Forsyth*, (docket no. 84-335), 472 US ___, n. 10; 105 S Ct 2806; 86 L Ed 2d 411, 426-427, n. 10 (1985).

Under the second element of the collateral order test, the district court's order denying the Petitioner's assertion of state-action antitrust immunity is a final determination of the disputed issue. Like the claims of double jeopardy,[7] the speech and debate clause,[8] absolute immunity,[9] and qualified immunity,[10] the state-action antitrust immunity doctrine is a complete, formal, and final rejection of Plaintiff's Sherman antitrust claim.

Lastly, the order denying Petitioner's Motion to Dismiss on the state-action antitrust immunity doctrine is effectively unreviewable on appeal from a final judgment. The Sixth Circuit panel erroneously concluded, without citing any authority, that the state-action antitrust immunity doctrine "is not an 'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim." Slip opinion p. 7. This Court, however, has characterized state-action

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[7]

Abney v *United States*, 431 US 651; 97 S Ct 2034; 52 L Ed 2d 651 (1977) (constitutional entitlement not to be twice put to *trial* for same offense).

[8]

Helstoski v *Meanor*, 442 US 500; 99 S Ct 2445; 61 L Ed 2d 30 (1979) (speech and debate clause designed to protect congressmen from the burden of having to defend themselves).

[9]

Nixon v *Fitzgerald*, 457 US 731; 102 S Ct 2690; 73 L Ed 2d 349 (1982) (entitlement not to stand trial or face burdens of litigation conditioned on resolution of absolute immunity question).

[10]

Mitchell v *Forsyth* (docket no. 84-335), 472 US ___; 105 S Ct 2806; 86 L Ed 2d 411 (1985) (entitlement not to stand trial or face burdens of litigation conditioned on resolution of qualified immunity question).

antitrust immunity in the same manner as qualified immunity and absolute immunity.[11] In *Hoover* v *Ronwin, supra,* the Court stated:

* * *

"If such an allegation [challenging the motive of a committee] is sufficient to survive a motion to dismiss, examining boards and committees would have to bear the substantial 'discovery and litigation burdens' attendant particularly upon refuting a charge of improper motive. See Areeda, Antitrust Immunity for 'State Action' after *Lafayette,* 35 Harv. L. Rev. 435, 451 (1981). Moreover, Ronwin has brought a suit for damages under the Sherman Act, with the threat of treble damages. There can be no question that the threat of being sued for damages—particularly where the issue turns on subjective intent or motive—will deter 'able citizens' from performing this essential public service. See *Harlow* v *Fitzgerald,* 457 U.S. 800, 814 (1982). . . ."

(*Hoover* v *Ronwin,* 466 US at 581, fn 34).

These state officials (Petitioners) are confronted with having to undergo the burden and expense of discovery and trial on these restraint of trade and conspiracy issues unless this Court reverses the Court of Appeals. If the Court of Appeals' decision stands, the message will be

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[11]

This court in *Mitchell* v *Forsyth* (docket no. 84-335), slip opinion pp. 14-15; 86 L Ed 2d at 425, acknowledged that *Harlow* v *Fitzgerald,* 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982), characterized qualified immunity in a 42 USC § 1983 action as an entitlement not to stand trial or face the other burdens of litigation. The court found that entitlement was an *immunity from suit* rather than a mere defense to liability. Moreover, the entitlement would be effectively lost if an order denying qualified immunity were not immediately appealable, and thus would be effectively unreviewable on appeal for final judgment.

plain—every time public officials' decisions are overturned on grounds they abused their discretion, a likely antitrust case and the spectre of treble damages awaits. If so, few public officers will decide for fear of being sued.

CONCLUSION

The issue whether the denial of a motion to dismiss an antitrust claim on the basis of state-action immunity is a final decision within the meaning of 28 USC § 1291 and is immediately appealable is an important question of federal law which was decided by the Court of Appeals and which has not been, but should be, settled by this Court. The writ of certiorari should issue to review the judgment of the Court of Appeals.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-1693

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HURON VALLEY HOSPITAL, INC., a Michigan nonprofit corporation,
Plaintiff-Appellee,

v.

CITY OF PONTIAC, et al.,
Defendants,

BAILUS WALKER, JR.; MAURICE S. REIZEN, M.D.; HERMAN A. ZIEL, M.D.; RICHARD REIHMER,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 30, 1986

Before: KEITH and MARTIN, Circuit Judges; and WEICK, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Bailus Walker, Jr., Maurice Reizen, Herman Ziel, Jr. and Richard Reihmer, former employees of the Michigan Department of Public Health, attempt to appeal the district court's denial of their motions for summary judgment. They argue that under the authority of *Mitchell v. Forsyth*, _ U.S. _, 105 S. Ct. 2806 (1985), they may appeal the district court's denial of sum-

mary judgment on the issues of qualified immunity and the state action antitrust exemption before a final judgment is rendered. The defendants further claim that the district court wrongfully deprived them of these immunities. We have jurisdiction to review only the denial of qualified immunity and we affirm the district court's denial of qualified immunity only.

Huron Valley Hospital is a Michigan nonprofit corporation that was organized in late 1975 for the purposes of constructing, owning and operating a hospital in Oakland County, Michigan. In 1976, Huron Valley filed an application for a state certificate of need under Michigan Compiled Laws sections 331.451 *et seq.*[1] Huron Valley also filed, as it was required to do, for federal capital expenditure approval under section 1122 of the Social Security Amendments of 1972, 42 U.S.C. § 1320a-1, with the Michigan Department of Public Health and the federally designated regional health systems agency. The Department of Public Health had been designated by the Governor of Michigan to administer the federal section 1122 program under an agreement between Michigan and the Secretary of the United States Department of Health and Human Services.[2] Both applications sought permission to proceed with the construction of a 153 bed acute care hospital in Oakland County which would cost 14.789 million dollars. The applications were complete in February of 1977.

The Michigan Department of Public Health denied Huron Valley's certificate of need application. Huron Valley then requested and received a hearing before the Michigan State

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[1]Michigan Compiled Laws Sections 331.451 *et seq.* were repealed and replaced by sections 333.22101 *et seq.*, effective September 30, 1978.

[2]The certificate of need program and the section 1122 program were created to eliminate unnecessary medical costs. The certificate of need program was designed to insure that new hospitals were not built and existing hospitals did not expand in areas where such facilities were not needed.

Health Facilities Commission seeking a reversal of this decision. The Commission affirmed the denial in January, 1980. In the meantime, on June 27, 1977, Pontiac General Hospital, an existing facility, filed a notice of intent to request a certificate of need to build a new hospital. Pontiac General's completed application was approved on August 25, 1978.

Having exhausted all of the Michigan administrative avenues, Huron Valley filed suit in the Oakland County Circuit Court which reversed the Commission on March 27, 1981, and ordered the Department of Public Health to issue a certificate of need to Huron Valley. *Huron Valley Hospital, Inc. v. Michigan State Health Facilities Comm'n,* Civ. Action No. 80-200439-AA (Oakland County Div. Ct. Mar. 27, 1981). The Michigan Court of Appeals affirmed the trial court's findings, holding that the Department of Public Health had based its decision upon unpublished criteria that favored the application of Pontiac General. *Huron Valley Hospital, Inc. v. Michigan State Health Facilities Comm'n,* 110 Mich. App. 236, 312 N.W.2d 422 (1981). The Court of Appeals held that the use of such unpublished criteria was a violation of the statutory limitations on the Department's discretion. 110 Mich. App. at 243-44. As a result, Huron Valley was deprived of an impartial review of its application in violation of its due process rights. 110 Mich. App. at 243-46. The Court ordered the issuance of the certificate of need because the Department's decision was "unsupported by competent, material, and substantial evidence." 110 Mich. App. at 251.

Following the Michigan Supreme Court's denial of the Commission's application for leave to appeal, 413 Mich. 853 (1982), the Department of Public Health issued a certificate of need to Huron Valley but limited its authorized capital expenditure to 14.789 million dollars, the amount requested in the outdated 1976 application. Huron Valley next filed a petition for clarification in the Oakland County Circuit Court and the court ordered the Department to issue a certificate of need in a reasonable amount which would allow construc-

tion of the planned facility. *Huron Valley Hospital, Inc. v. Michigan State Health Facilities Comm'n,* Civ. Action No. 80-200439-AA (Oakland County Civ. Ct. Oct. 21, 1982). The Department finally issued a certificate of need to Huron Valley on October 27, 1982, for 44.651 million dollars.

During the same period, Huron Valley was also discussing the federal section 1122 approval with the Michigan Department of Public Health. On February 23, 1983, the Regional Health Administrator issued a section 1122 approval after the Michigan Department of Public Health, after discussions and intervention by the Michigan Attorney General, recommended approval. Shortly thereafter, an Assistant United States Surgeon General vacated the section 1122 approval. More litigation followed in the United States District Court which ordered that the section 1122 approval be reinstated. *Huron Valley Hospital, Inc. v. City of Pontiac,* 585 F. Supp. 1159 (E.D. Mich. 1984). Construction finally began on the hospital in 1984.

In addition to the litigation discussed earlier, Huron Valley began the present action in 1978, claiming that numerous defendants conspired to violate the antitrust laws by preventing Huron Valley from entering the Oakland County health care market. In 1979, Huron Valley sought to amend its original complaint to add 42 U.S.C. § 1983 violations and to add the state defendants who are now before us. The district court did not allow the tendered amendment and granted summary judgment in favor of the various defendants. *Huron Valley Hospital, Inc. v. City of Pontiac,* 466 F. Supp. 1301 (E.D. Mich. 1979). On appeal, we disagreed and vacated the district court judgment, remanding the case for the entry of a stay pending the completion of the state administrative and judicial proceedings. *Huron Valley Hospital, Inc. v. City of Pontiac,* 666 F.2d 1029 (6th Cir. 1981). State proceedings were complete in 1982 when the Michigan Supreme Court denied leave to appeal, thus affirming the Oakland County Circuit Court's order that a certificate of need be issued to Huron Valley Hospital.

With the present case thus reactivated, Huron Valley filed an amended complaint in 1983, adding the four defendants who now pursue this appeal. Huron Valley claims that beginning in 1976, the various defendants engaged in a general conspiracy to restrain trade in violation of section one of the Sherman Act and that certain of the defendants, including those before us on appeal, conspired to deprive Huron Valley of its fourteenth amendment due process rights in violation of 42 U.S.C. § 1983.

The defendants moved the district court to dismiss this action and alternatively moved for summary judgment. The court denied the motions on various grounds, finding, among other things, that these defendants could not claim qualified immunity or the state action antitrust exemption.

Denials of summary judgment usually may not be appealed immediately because they are not "final decisions of the district courts." 28 U.S.C. § 1291. The requirement of finality means that all claims must be raised in a single appeal after a judgment on the merits. *Richardson-Merrell, Inc. v. Koller,* _ U.S. _, 105 S. Ct. 2757, 2760 (1985); *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374 (1981). The Supreme Court has frequently recognized the extraordinary delay and expense which would occur if immediate appeals were allowed from each and every order of the district court. *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 265 (1982).

For every rule, however, we generally have found a "narrow exception," *Firestone,* 449 U.S. at 374, and the same is true for the finality rule of section 1291. We traditionally have not looked upon piecemeal appeals with any degree of favor. *See Solomon v. Aetna Life Ins. Co.,* 782 F.2d 58, 60-61 (6th Cir. 1986) (district court certification under Fed. R. C. P. 54(b), which governs multiple claims or claims involving multiple parties, vacated because no justification for certification given). Yet, the collateral order doctrine has evolved so that a "small class" of prejudgment orders may be appealed

immediately. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 546 (1949). To be appealable, these prejudgment orders must "finally determine claims of right separable from, and collateral to, rights asserted in the action, [and must be] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* The Supreme Court clarified this collateral order doctrine in *Richardson-Merrell, Inc. v. Koller*, _ U.S. _, 105 S. Ct. 2757 (1985), a case holding that attorney disqualification in the civil context is not immediately appealable. "[A]t a minimum," the order must "satisfy three conditions: It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" *Richardson-Merrell*, 105 S. Ct. at 2761 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

The Supreme Court, in *Mitchell v. Forsyth*, _ U.S. _, 105 S. Ct. 2806, 2817 (1985), held that the denial of summary judgment on the issue of qualified immunity satisfied these requirements and was appealable immediately, even though no final judgment in the case as a whole has been entered. *Mitchell* interpreted *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), as recognizing that qualified immunity was an "entitlement" to immunity from suit and the burdens of a trial, not a defense to liability. *Mitchell*, 105 S. Ct. at 2815-16. Earlier, the court had determined that absolute immunity was an "entitlement" not to be subject to suit and that such an "entitlement" was lost forever if an immediate appeal of its denial was not allowed. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). The *Mitchell* Court held that because of *Harlow*'s clarifications about the nature of qualified immunity, it was apparent that the "entitlement" of qualified immunity, like the "entitlement" of absolute immunity, would be lost forever if the claiming party was required to go through a trial and thus early review was warranted. *Mitchell*, 105 S. Ct. at 2815-16. The Court then found that

the denial of summary judgment on qualified immunity grounds satisfied the other two prongs of the collateral order test because it conclusively determined the issue and that the claim of immunity was "conceptually distinct" from the merits. *Id.* at 2816-17. Like denials of absolute immunity, the Court found that denials of qualified immunity on summary judgment satisfied the collateral order three-part test and were immediately appealable. *Id.* at 2817. *See also Nixon,* 457 U.S. at 743. As a result of *Mitchell,* we have jurisdiction to consider the propriety of the district court's determination that these defendants were not entitled to qualified immunity.

Having resolved that we have jurisdiction to review the qualified immunity issue, we turn now to the attempted appeal of the denial of the state action antitrust exception. The state action antitrust exemption originated with the notion that the Sherman Act did not prohibit a state from restraining competition and did not otherwise hinder a state's ability to regulate commerce within its borders. *Parker v. Brown,* 317 U.S. 341 (1943). *See Southern Motor Carriers Rate Conference, Inc. v. United States,* _ U.S. _, 105 S. Ct. 1721, 1726 (1985). State regulation of private parties, such as Huron Valley, is not subject to the antitrust laws if the challenged restraint is "clearly articulated and affirmatively expressed as state policy," *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978) (opinion by Brennan, J.)), and if the state actively supervises the private anticompetitive conduct. *Midcal,* 445 U.S. at 105.

We believe that a denial by the district court of this defense does not satisfy the three requirements necessary for an appeal under the collateral order doctrine. First, the exemption is not an "entitlement" of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim. Further, it is doubtful that

the exemption is lost if immediate appeal is denied. Review of the denial on direct appeal after further development of the record certainly affords the necessary protection if the defense is valid. Moreover, the state action antitrust exemption does not satisfy the requirement of the collateral order doctrine that the claim be completely separate from the merits of the original claim. In the case before us, the claim is that the defendants conspired and acted to prevent Huron Valley from entering the appropriate health care market in violation of the Sherman Act. The analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct overlaps the analysis necessary to determine whether the defendants have violated the rights of Huron Valley. This is not a simple conclusion that the law is clearly established as is necessary with qualified immunity. It is a determination that affirmatively expressed state policy is involved and that the state actively supervises the anticompetitive conduct. These conclusions are intimately intertwined with the ultimate determination that anticompetitive conduct has occurred in violation of the protected rights of Huron Valley.

Immediate appeals of collateral orders have been allowed in very few situations. *See, e.g., Mitchell v. Forsyth*, _ U.S. _, 105 S. Ct. 2806 (1985) (qualified immunity); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity); *Abney v. United States*, 431 U.S. 651 (1977) (double jeopardy); *Stack v. Boyle*, 342 U.S. 1 (1951) (excessive bail); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (security bond). *Cf. Richardson-Merrell, Inc. v. Koller*, _ U.S. _, 105 S. Ct. 2757 (1985) (grant of motion for attorney disqualification in civil case not appealable); *Flanagan v. United States*, 465 U.S. 259 (1984) (attorney disqualification in criminal case not appealable); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (denial of motion for attorney disqualification in civil case not appealable). As Justice Brennan in his dissent in *Mitchell* stated:

> We have always read the *Cohen* collateral order doctrine narrowly, in part because of the strong policies supporting the § 1291 final judgment rule. The rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way.

105 S. Ct. at 2825. We agree with this reasoning and decline to extend the right of immediate appeal any farther than the Supreme Court already has extended the right.

This Court is not required to review the state action issue simply because we review the qualified immunity issue. In *Abney v. United States,* 431 U.S. 651 (1977), the Court allowed prejudgment review of a double jeopardy claim but declined to extend the review to a sufficiency of the indictment claim. *Id.* at 662-63. In refusing to extend the review, the Court noted that such action would encourage parties to seek review of a frivolous appealable claim as a vehicle to secure review of other nonappealable determinations. *Id.* at 663. We agree.

Thus, the only issue before us is the defendant's claim to qualified immunity. In reviewing the denial we begin with this statement from *Mitchell*:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it needs to determine is a question of law: *whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law*

> *clearly proscribed the actions the defendant claims he took.*

105 S. Ct. at 2816 (footnote omitted) (emphasis added). In *Mitchell* the Court found that it was not clearly established that warrantless wiretapping aimed at gathering information regarding a domestic threat to national security was legal or illegal. 105 S. Ct. at 2818. Before *Mitchell,* the question had been expressly left open, *see Katz v. United States,* 389 U.S. 347, 358 n.23 (1967), and several district courts had allowed such wiretapping. *Mitchell,* 105 S. Ct. at 2818-19; *see United States v. Dellinger,* No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd,* 472 F.2d 340 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973); *United States v. O'Neal,* No. KC-CR-1204 (Kan. Sept. 1, 1970), *appeal dismissed,* 453 F.2d 344 (10th Cir. 1972).

There can be no doubt here that the defendants' "conduct violated clearly established law." *Mitchell,* 105 S. Ct. at 2816. As a limitation on unbridled discretion, the certificate of need statute of Michigan required the Director of the Department and the Commission to consider eleven specific criteria in evaluating certificate of need applications.[3] The state also

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[3]Those eleven criteria were

(1) The patterns and level of utilization, availability, and adequacy of existing facilities, institutions, programs, and services, in the immediate community and region concerned.

(2) The degree to which the residents and physicians of the immediate community and region concerned, are provided access to the services and programs of the health facility applying for the certificate of need.

(3) The availability, and adequacy and promotion of services such as preadmission, ambulatory, or home care services which may serve as alternatives or substitutes for inpatient or resident care.

(4) The possible economies and improvement in services to be derived from consolidation of highly specialized health facility services and from the operation of cooperative or

required that the director promulgate rules in accordance with and subject to the Michigan Administrative Procedure Act of 1969 to provide for the issuance of certificates of need. Mich. Comp. Laws § 331.454. The Administrative Procedure Act required the Department of Public Health, a state agency, to promulgate, process and publish all of its rules and regulations so that its discretion in issuing certificates of need was not absolute and uncontrolled. Mich. Comp. Laws § 24.201 *et seq.*; 110 Mich. App. at 243.

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shared central services including but not limited to laboratory, radiology, pharmacy, and laundry service.

(5) The possible economies and improvement in patient or resident care to be anticipated from affiliation or other contractual arrangements between facilities, institutions and service agencies and organization.

(6) The availability of manpower.

(7) That the health facility does not discriminate because of race, religion, color, national origin, age, or sex in any area of its operations including but not limited to employment, patient admission and care, room assignment, and professional and nonprofessional selection and training programs. . . .

(8) In the case of a nonprofit hospital, that health facility is in fact governed by a body which is composed of a majority consumer membership.

(9) The applicant's ability to finance the project for which the certificate of need is requested and ability to finance the operation of the health facility following completion of the project.

(10) Local and regional rules, regulations and standards adopted by the appropriate local and regional area wide comprehensive health planning agencies which reflect the conditions, problems, and resources of the various areas represented by such agencies and which are not inconsistent with the foregoing criteria.

(11) Other factors and criteria which contribute toward the orderly development of quality health care for all citizens.

Mich. Comp. Laws § 331.455a.

Even if the requirements of the Administrative Procedure Act were unclear at the outset, by 1976, the Michigan Court of Appeals had clarified that the Administrative Procedure Act required promulgation, processing and publication of all rules and regulations of a state agency. *See Mallchok v. Liquor Control Comm'n,* 72 Mich. App. 341; 249 N.W.2d 415 (1976). In *Mallchok,* the liquor commission, in evaluating applications for liquor licenses, had used an unwritten policy of not granting a license to an applicant whose establishment was within one half mile of an existing license holder. The statute governing the granting of licenses required that the commission's actions be in accordance with the provisions of the Administrative Procedure Act. Mich. Comp. Laws § 436.7. The court held that the policy must be promulgated, processed and publicized and that use of the unpromulgated policy was error. Both by statute and judicial decision, Michigan law was clearly established at least since 1976 that state agencies such as the Department of Public Health, whose actions were governed by statutes referencing the Michigan Administrative Procedure Act, must promulgate the rules and regulations they use in their evaluations.

The Michigan state courts found in the proceedings involving the Huron Valley application that the Department of Public Health and its Director were guided in their analysis of the certificate of need applications by the following three specific criteria:

(1) no new beds will be constructed in a service area which is classified as overbedded by the State Plan;

(2) the highest priority will be granted to existing facilities seeking a certificate of need to modernize or correct licensing deficiencies; and

(3) the statute would be utilized to remove existing beds from line only in the most extreme circumstances.

110 Mich. App. at 242-243. These criteria were not promulgated and prospective applicants such as Huron Valley were not advised of their existence by the reviewing authority. *Id.* at 243. Under Michigan law, a rule is an agency standard or policy which implements the law that the agency administers. Mich. Comp. Laws § 24.207. Because of the purpose and content of the unpromulgated criteria, they were rules and should have been promulgated. Nothing in the eleven enumerated factors that the certificate of need statute directed the Department to consider suggested a preference for existing facilities. Nor did anything else in the certificate of need statute express a preference for existing facilities. *See also id.* at 244. By 1976, the Michigan law was clearly established and clearly applicable to Huron Valley's application for a certificate of need. The Department's use of unpromulgated criteria and the Commission's agreement with that use in considering applications of certificates of need violated that clearly established law. *See* 110 Mich. App. at 243-44.

While *Mitchell* requires a simple finding that the law is clearly established at the time the act was committed, we note that the *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), test for applying qualified immunity requires a finding that the official conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Without a doubt, the defendants here should have known that their actions in applying the unpromulgated criteria violated the statute from which they derived their power to grant certificates of need. The statute initially created Huron Valley's protected interest and defined the criteria which must be used in granting or denying its certificate of need. The defendants should have known that their actions infringed upon Huron Valley's rights. *See Spruytte v. Walters,* 753 F.2d 498 (6th Cir. 1985), *cert. denied,* _ U.S. _, 106 S. Ct. 788 (1986). *See also Davis v. Scherer,* 468 U.S. 183 (1984).

The district court correctly denied these defendants the protections of the defense of qualified immunity, and we

affirm on that issue only. On the state action antitrust exception issue, we dismiss the appeal.

Costs are awarded to Huron Valley.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HURON VALLEY HOSPITAL, INC. A Michigan non-profit corporation, Plantiff, v. CITY OF PONTIAC, a Michigan municipal corporation; CITY OF PONTIAC HOSPITAL BUILDING AUTHORITY, a Michigan municipal corporation; PONTIAC OSTEOPATHIC HOSPITAL, a Michigan non-profit corporation; CRITTENTON HOSPITAL, a Michigan non-profit corporation; SISTERS OF MERCY CORPORATION, a Michigan non-profit corporation; COMPREHENSIVE HEALTH PLANNING COUNCIL OF SOUTHEASTERN MICHIGAN, a health systems agency; NORTH OAKLAND COUNTY PLANNING STEERING COMMITTEE, a planning group under the auspices of GREATER DETROIT AREA HEALTH COUNCIL, INC., a Michigan corporation; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, an executive agency of the United States; MARGARET HECKLER, as Secretary of the Department of Health and Human Services; BAILUS WALKER, JR.; MAURICE S. REIZEN, M.D.; HERMAN A. ZIEL, M.D.; RICHARD REIHMER; PAUL MASSERON, and TERENCE E. CARROLL, Defendants.	NO: 78-72970

OPINION

Once again, this matter is before the Court upon motions to dismiss and/or for summary judgment. The basic facts are set forth in this Court's prior opinion, *Huron Valley Hospital, Inc.* v *City of Pontiac*, 585 F. Supp. 1159 (E.D. Mich. 1984).

Here, the four state defendants, present and former officials of the Michigan Department of Public Health (MDPH) (Balius Walker, Jr., Richard Reihmer, Maurice S. Reizen, M.D., and Herman A. Ziel, M.D.) and the hospital defendants (Pontiac General Hospital, Pontiac Osteopathic Hospital, Crittenton Hospital, and the Sisters of Mercy Corporation) have filed motions to dismiss and for summary judgment. The MDPH, as an entity, was dismissed by stipulation on February 18, 1983.

I. STATE DEFENDANTS

A. Statute of Limitations

The first motion by the state defendants claims that the action is untimely under applicable statutes of limitation. The limitations period for an antitrust claim is four years under 15 U.S.C. § 15b, and for a 42 U.S.C. § 1983 claim, the applicable statute is Michigan's three year limitation on personal injury claims, M.C.L.A. § 600.5805(8). *See Wilson v. Garcia*, 471 U.S. ____, 85 L.Ed. 2d 254, 107 S.Ct. ____.

The state defendants were named in a proposed amended complaint, but the amendment was denied by Judge Kennedy in 1979[1]. Therefore, they did not become

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[1] *See Huron Valley Hospital, Inc. v. City of Pontiac*, No. 78-72970 (E.D. Mich. Jan. 29, 1979)

defendants in this action until they were named in the amended complaint filed on November 15, 1983. Thus, the crucial date for any antitrust claim is four years before that, or November 15, 1979, and for any civil rights claim, November 15, 1980, in the absence of tolling.[2] These defendants argue that the latest act that even arguably could gave rise to a cause of action was the failure of MDPH to issue a second certificate of need for an additional 150 beds in the hospital within 90 days after the request for it was filed on June 1, 1978—90 days representing the time within which the MDPH was required to act upon an application for a Certificate of Need (CON) under 42 C.F.R. § 100.101. In other words, the defendants argue that plaintiff's cause of action accrued, if at all, on August 30, 1978 at the latest, thus barring both the Section 1983 claim and the antitrust claim.

This argument overlooks the fact that both the district court[3] and the court of appeals[4] held that this action was not ripe for adjudication until the state administrative and judicial proceedings were complete. Indeed, the case was stayed at the direction of the Court of Appeals for two

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[2]

The defendants first assert that the applicable limitation period should be the 60 day period for appealing an adverse administrative determination under the Michigan Administrative Procedures Act, M.C.L. § 24.304. This argument is without merit. *Burnett v. Gratton*, 468 U.S. ___, 82 L.Ed 2d 36, 104 S.Ct. ___ (1984), held that a six-month state statute of limitations on filing employment discrimination complaints with an administrative agency was inappropriate for actions under the Civil Rights Act (42 U.S.C. § 1981 *et seq.*).

[3]

Huron Valley Hospital, Inc. v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979), *reversed on other grounds*, 666 F.2d 1029 (6th Cir. 1981).

[4]

Id. 666 F.2d 1029 (6th Cir. 1981).

years. The state proceedings were not completed until October 27, 1982, when the MDPH finally issued plaintiff a CON in a reasonable amount.

In addition, plaintiff has alleged that these defendants engaged in a continuing conspiracy to prevent the construction of this hospital that extended at least until April of 1982 as to these defendants. Although defendants argue that the allegations of contiuing conspiracy have not been pled with sufficient particularity, the complaint does contain several general allegations of continuing conspiracy, and the Sixth Circuit has held that a complaint may be dismissed as time-barred under Fed. R. Civ. P. 12(b)(6) only if "the statement of the claim affirmatively shows that plaintiff can prove *no* set of facts that would entitle him to relief." *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1369 (6th Cir. 1975) (emphasis in original). This Court cannot say that the complaint in this case shows such a deficiency on its face. In addition, the Supreme Court held, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), that in a "continuing conspiracy to violate the antitrust laws . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act."

Finally, these claims are not barred by the statute of limitations because they relate back to the date of the filing of the original complaint, November 16, 1978. Because the original complaint described alleged illegal acts on the part of MDPH, the state agency of which these defendants were officials, and because the amended complaint proposed in January 1979 named these defendants individually and sought to add a Section 1983 claim, the requirements of Fed. R. Civ. P. 15(c) for relation back of an

amendment are met as to these defendants.[5] Therefore, for the reasons given, there is no basis for dismissing these defendants because of the running of the statute of limitations. The suit is timely as to them.

B. Res Judicata

These defendants next claim that plaintiff's Section 1983 claims could and should have been raised in prior state proceedings, and that plaintiff's failure to do so is *res judicata* in this action.[6] This assertion is without merit. The state proceedings were simply appeals from administrative determinations, limited under the state Administrative Procedures Act[7] to a determination of whether the administrative decision was supported by competent, substantial evidence on the record taken as a whole. *Avon*

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[5]

These defendants concede the amended complaint arose out of the same transaction or occurrence, but rely on *Ringrose v. Engelberg Huller Co., Inc.*, 692 F.2d 403 (6th Cir. 1982), for the proposition that Rule 15 does not allow the addition of a new party after the statute would otherwise have run. Defendants assert that the rule permits an amendment to relate back only if it seeks to change a party who is already in the action—in essence, only when correcting a misnomer. *Ringrose* does not support such a narrow construction of Rule 15, since the court remanded the case for a determination of whether service on a predecessor corporation was sufficient to give such notice that the two successor corporations would not be prejudiced in their defenses on the merits, indicating that the real concern was with the adequacy of the notice given. *See also* 6 C. Wright & A. Miller, *Federal Practice & Procedure*, § 1498, at 512 (1971) where they note a split on the issue, but see "no justification" for such a restrictive interpretation as defendants urge, so long as the notice requirement is satisfied.

[6]

See discussion of prior state proceedings in *Huron Valley Hospital, Inc. v. City of Pontiac*, 585 F. Supp. 1159, 1161-62 (E.D. Mich. 1984).

[7]

M.C.L. § 24.201 *et. seq.*

Township v. Boundary Commission, 96 Mich. App. 736 (1980); *Murphy v. Oakland County Dept. of Health*, 95 Mich. App. 337 (1980). That fact distinguishes this case from *Allen v. McCurry*, 449 U.S. 90 (1980), and *Migra v. Warren City School District Board of Education*, ___ U.S. ___, 79 L.Ed. 2d 56, 104 S. Ct. 892 (1984), which held that any claims which either were or could have been litigated in a prior state proceeding were barred in a subsequent federal Section 1983 action, because the state proceedings in those cases afforded the opportunity to raise the issue on which the Section 1983 claims were based.

Plaintiff did raise some due process arguments during the state proceedings in this case.[8] Those allegations were limited, however, to defects in the administrative process, and did not encompass the broad allegations of conspiracy raised by the Section 1983 claim in the instant case.

The state defendants also claim that the earlier dismissal with prejudice of MDPH, of which these defendants were officials, is *res judicata* to them as individuals. The settlement agreement expressly provides, however, that "such dismissal is not intended, and shall not be construed to effect the liability, if any, of any of MDPH's officials, employees or agents, but is intended to apply to the Department, as an agency of government, only."

Therefore, it is clear that plaintiff's claims are not barred by res judicata.

C. 11th Amendment

These defendants next assert that this suit is actually against the Michigan state treasury, and is therefore barred

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[8] *See Huron Valley Hospital, Inc. v. State Health Facilities Commission*, 110 Mich. App. 236, 244-46 (1981).

by the 11th Amendment's prohibition on suits against the states in federal court. While it is true that a suit against a state official which seeks damages from the public treasury is generally barred by the 11th Amendment, the Supreme Court has held that "damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974). In the *Scheuer* case, the Court held that an award of money damages from a state official may be permissible if the defendant cannot show that his actions were characterized by good faith and reasonableness, and reversed the dismissal of a § 1983 action against the Governor of Ohio and other high state officials on 11th Amendment grounds. The Court noted that Section 1983 was intended to remedy precisely such "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." 416 U.S. at 243 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

The Michigan Court of Appeals has already found that there have been abuses of discretion and actions exceeding statutory authority amounting to a denial of due process and equal protection in *Huron Valley Hospital, Inc. v. State Health Facilities Commission*, 110 Mich. App. 236, 244-46 (1981). Further, the complaint contains allegations of conspiracy which put defendant's good faith squarely into contention. Therefore, dismissal under 11th Amendment immunity would be inappropriate at this time.

D. "State Action" Antitrust Immunity

The state defendants claim immunity from antitrust liability under the so-called "state action" exemption, which derives from the 1943 Supreme Court case of *Parker v. Brown*, 317 U.S. 341 (1943), in which the Court held that

states are immune from antitrust liability when they act as sovereigns. In *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court set forth a two-part test to determine whether the exemption should apply. It held that the challenged restraint must be "clearly articulated and affirmatively expressed as state policy" and must be " 'actively supervised' by the State itself." 445 U.S. at 105.

Here, plaintiff has challenged the good faith of the state defendants, and a state court has held that MDPH exceeded and abused its statutory authority and denied plaintiff due process and equal protection. Therefore, it cannot be said that the actions of these defendants were taken pursuant to a clearly articulated state policy. The Seventh Court observed that:

> [I]t has generally and sensibly been held that where the activities of a governmental unit are outside the scope of the antitrust laws, the officials charged with performing those activities enjoy the same protections.... Even in such cases, however, it has sometimes been recognized that an official's actions ultra vires or in bad faith might present a different question.

Kurek v. Pleasure Driveway and Park District, 557 F.2d 580, 591 (7th Cir. 1977).

It is precisely such allegations of actions taken ultra vires and in bad faith that distinguish the instant action from *Southern Motor Carriers Rate Conference v. U.S.*, ___ U.S. ___, 85 L.Ed. 2d 36, 105 S.Ct. ___ (1985). In *Southern Motor Carriers*, the United States filed suit to enjoin the practice of joint ratemaking by private trucking collectives, a practice that was authorized by state public service commissions. The Court found the practice immune from antitrust liability under the state action exemption, but it is

important to note that there were no allegations that the private parties acted in bad faith or exceeded what had been authorized by the public service commissions. The challenge in *Southern Motor Carriers* was to the very practice of private collective ratemaking. In the instant action, by contrast, plaintiff challenges the certificate of need procedures only as applied to it, and it was the handling of this plaintiff's CON application that the Michigan Court of Appeals found constituted a due process violation.

Furthermore, the decision of the Supreme Court in *Hoover v. Ronwin*, ___ U.S. ___, 80 L.Ed. 2d 590, ___ S.Ct. ___ (1984), provides little help to these defendants. That case dealt with a challenge to state bar admission process, and the Court held that, where the challenged state action is that of the state legislature or supreme court, it need not address the issues of "clear articulation" or "active supervision." Such a holding is inapplicable to these officials because they act neither as a legislature nor as a supreme court. They are officials of a state administrative agency.

E. Harlow v. Fitzgerald Qualified Immunity

Defendants next claim that under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), they are shielded from liability. *Harlow* held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or consitutional rights of which a reasonable person would have known." 457 U.S. at 818.

In the Sixth Circuit, *Harlow* qualified immunity is an affirmative defense. In *Alexander v. Alexander*, 706 F.2d 751 (6th Cir. 1983), the court held:

> [A] Section 1983 defendant retains the burden of pleading the qualified immunity defense . . ., and proving either that the law was not clearly established at the time of plaintiff's alleged injury, or, if the law was clearly established, that he neither knew or should have known of the relevant legal standard due to extraordinary circumstances . . . Since the district court placed the burden of proving the qualified immunity defense on the wrong party, we remand this case to the district court for reconsideration of this issue in light of this opinion.

Id. at 754.

The Court does not think that the defendants have carried their burden of proof on this issue so as to require summary judgment. In this case, the Michigan Court of Appeals found that defendants' interpretation of the statute was "based on extremely tenuous notions about statutes which were not clearly related to the certificate of need statute." *Huron Valley Hospital, Inc. v. Michigan State Health Facilities Commission*, 110 Mich. App. 236, 248-49 (1981). Further, even after defendants were ordered to issue the certificate of need by the Oakland County Circuit Court, they issued one for an amount that the court later determined to be unreasonably low. It finally took a writ of mandamus from this Court in *Huron Valley Hospital, Inc. v. City of Pontiac*, 585 F. Supp. 1159 (E.D. Mich. 1984), to secure Section 1122 approval for the plaintiff. In light of these facts, it cannot be said as a matter of law that defendants are entitled to qualified immunity under *Harlow*.

F. Plaintiff's Claim Under 42 U.S.C. §1983

Defendants make three claims seeking to dismiss the Section 1983 claim. They first argue that plaintiff had no

protectible property interest in a certificate of need or in Section 1122 approval. Secondly, they assert that plaintiff has not carried its burden under *Parratt v. Taylor*, 451 U.S. 527 (1981), of pleading and proving that state remedies are inadequate to accord due process. Finally they maintain that there is no state action that would give rise to a Section 1983 claim. The Court will deal with these claims *seriatim*.

Defendants' first argument is that plaintiff has no protectible property interest in a certificate of need or in Section 1122 approval under *Board of Regents v. Roth*, 408 U.S. 564 (1972) since a mere "unilateral expectation" of a property interest is not sufficient without a "legitimate claim of entitlement to it." 408 U.S. at 577. They further argue that, since a holder of an existing liquor license does not have a property interest in its renewal under Michigan law, (*see, Bundo v. Walled Lake*, 395 Mich. 679 (1976)), plaintiff similarly can have no protectible property interest in a certificate of need or in Section 1122 approval for an entirely new hospital, and is akin to a first-time license seeker who has only a "unilateral expectation."

Defendants' argument may have been accurate characterization of plaintiff's position in 1976 when it first sought approval, but is is no longer accurate as of today. Michigan courts determined that plaintiff was entitled to a certificate of need and ordered that one be issued, and defendants continued to resist. Indeed, the state courts have already held that plaintiff was denied due process in the consideration of its application. It is clear that plaintiff has raised sufficient factual issues to survive a motion to dismiss on this question.

Defendants next assert that plaintiff has not carried its burden under *Parratt v. Taylor*, 451 U.S. 527 (1981), of pleading and proving that state remedies are inadequate to accord due process. *Parratt*, however, is not on point. In

Parratt, a state employee negligently lost a prisoner's hobby kit, and the court concluded that a post-deprivation tort action provided a constitutionally sufficient remedy. Here, plaintiff has alleged a concerted effort by both state employees and private parties to deprive it of its due process guarantees. An argument similar to defendants' was made in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and the Court observed: "This argument misses *Parratt's* point. In *Parratt*, the Court emphasized that it was dealing with a 'tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure.' " 455 U.S. at 435-36. The *Logan* Court held that a Section 1983 action was proper.

While it is true that plaintiff alleges that these defendants acted ultra vires, this situation is much closer to a deprivation as a result of state procedure itself, as in *Logan*, than to mere negligence as in *Parratt*. *Parratt* goes only to unauthorized deprivation of property. This case involved the alleged abuse of established state procedure, with the knowledge and cooperation of state officials, and the complaint therefore is sufficient.

Finally, defendants maintain that any part they may have played in the denial of plaintiff's Section 1122 approval is not a proper subject for a Section 1983 action, because their role was limited to making an initial review and submitting a recommendation to HHS, and thus the denial was not state, but federal, action. This Court has already determined in its prior opinion granting summary judgment as to Count III of the complaint that:

> The MDPH and the Michigan Attorney General clearly believed, and correctly, that its decision-making process regarding both the CON and Section 1122 application were the same. It denied them both

> initially for the same reasons. It clearly believed that the decisions of the Michigan courts regarding the CON application were equally valid and binding on the state's consideration of the Section 1122 application.

Huron Valley Hospital, Inc. v. City of Pontiac, 585 F. Supp. 1159, 1163 (E.D. Mich. 1984).

The amended complaint alleges a comprehensive effort by state officials and private parties to prevent the construction of this hospital, and therefore involves sufficient state action for a Section 1983 claim.

II. HOSPITAL DEFENDANTS

A. 42 U.S.C. § 1983 Claim

These defendants argue that plaintiff has no property interest protectible in a Section 1983 action and, therefore, they should be dismissed. For the same reasons stated, *supra*, with reference to the state defendants, this argument is without merit.

The hospital defendants additionally argue that any state action for the purpose of a Section 1983 claim cannot extend to them, since they are private actors not clothed with the authority of state law.

It is clear, however, that plaintiff's allegations of actions by these defendants involving both state and private actors are sufficient to invoke Section 1983 against these defendants. In *Adickes v. S. H. Kress & Company*, 398 U.S. 144, 152 (1970) the Supreme Court held, quoting *United States v. Price*, 383 U.S. 787, 794 (1966), that: "[p]rivate persons, jointly engaged with state officials in the prohibited action,

are acting 'under color' of state law for purposes of the statute. . . . It is enough that [the accused] is a willful participant in joint activity with the State or its agents."

In 1980, in *Dennis v. Sparks*, 449 U.S. 24 (1980), the Court held that allegations of a conspiracy with a judge are sufficient to defeat a motion to dismiss for failure to allege state action on the part of private parties, even where the judge is dismissed from the action as entirely immune. *See also Macko v. Bryan*, 641 F.2d 447 (6th Cir. 1981), reversing a grant of summary judgment where a conspiracy was alleged between two prosecutors and several private parties, although the prosecutors were dismissed as immune. *See also Tarleton v. Meharry Medical College*, 717 F.2d 1523, 1533-34 (6th Cir. 1983), in which the court reversed the grant of summary judgment for private defendants in a suit alleging both antitrust and Section 1983 violations, quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961): "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."

B. Failure to Allege a Conspiracy With Sufficient Particularity

These defendants contend that the complaint should be dismissed because the allegations of antitrust conspiracy in the amended complaint are not specific enough. It is true that the allegations are not extremely specific, but the Supreme Court has stated a policy against summary disposition of antitrust conspiracy claims in *Poller v. CBS*, 368 U.S. 464, 473 (1962): "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the conspirators, and hostile witnesses thicken the plot." *See* A.B.A. Antitrust Section,

Antitrust Law Developments 3 (2d Ed. 1984). The Sixth Circuit has cited *Poller* in reversing the summary dismissal of the antitrust claim in *Tarleton v. Meharry Medical College, supra,* noting that summary dismissal should be granted only "very sparingly" under this "rigorous standard."

Therefore, this Court is not prepared to dismiss plaintiff's claims of conspiracy for failure to plead with sufficient particularity.

C. Antitrust Immunity Under Noerr-Pennington

The hospital defendants claim the case should be dismissed under the *Noerr-Pennington* doctrine, which holds that joint efforts to influence public officials do not violate the antitrust laws, even though intended to eliminate competition. *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). This doctrine is intended to preserve the first amendment right to petition the government. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972).

It should be noted, however, that an exception to this doctrine has been created where the attempt to influence government is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr, supra,* 365 U.S. at 144. The Supreme Court has noted that the line between legitimate conduct and a sham "may be a difficult line to discern and draw." *California Motor Transport, supra,* 404 U.S. at 513. The allegations in this case go beyond the mere filing of one lawsuit, which the Sixth Circuit recently found protected under the *Noerr-Pennington* doctrine in *City of Cleveland v. Cleveland*

Electric, ____ F.2d ____ (6th Cir. 1984), but are more analogous to the sort of abuse of process in barring access to agencies or courts that the court state would fall within the sham exception.

The Second Circuit held in *Litton Systems, Inc. v. AT&T*, 700 F.2d 785, 809 n.36 (2d Cir. 1983) that the sham exception to the *Noerr-Pennington* doctrine is applicable in the situation known as "agency capture," where the regulated become the regulators. This is precisely the situation alleged in the complaint in this action, and taking the allegations as true for the purpose of this motion, as the Court must, the Court finds that *Noerr-Pennington* does not apply to these defendants, and does not provide a basis for dismissal.

D. Statute of Limitations

Although the requirements of Fed. R. Civ. P. 15(c) are not met as to these hospital defendants, since they were not named in the amended complaint proposed in January 1979, plaintiff's allegations of a continuing conspiracy are even more significant for them, because they are alleged to have taken a more active role in the continuing effort to deny plaintiff Section 1122 capital expenditure approval. Specifically, these defendants are alleged to have conducted a series of ex parte requests for reconsideration of MDPH's Section 1122 approval, which succeeded in convincing HHS to revoke its previously-issued approval.

Since the conspiracy is alleged to have involved these defendants up until this Court's issuance of a writ of mandamus in April 1984, these allegations clearly are sufficient to enable plaintiff to survive a statute of limitations challenge from the hospital defendants.

III. LOCAL GOVERNMENT ANTITRUST ACT OF 1984

Defendants City of Pontiac and City of Pontiac Hospital Building Authority also move for a partial summary judgment as to Count I, which alleges violation of the Sherman Antitrust Act. These defendants rely upon the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (codified at 15 U.S.C. § 35).

Section 3(a) of that Act provides that no damages may be recovered under the Clayton Act from any local government or official or employee thereof acting in an official capacity.

Section 3(b) of the Act, however, limits its application. That section provides:

> Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that Subsection (a) shall not apply.

This action was filed originally in November 1978, and Judge Kennedy granted defendants' motion for summary judgment in March 1979. *Huron Valley Hospital, Inc. v. City of Pontiac*, 466 F. Supp. 1301 (E.D. Mich. 1979). The Sixth Circuit vacated that decision, 666 F.2d 1029 (6th Cir. 1981), and remanded in December 1981 for a stay pending the completion of state administrative and judicial pro-

ceedings. Plaintiff filed a proposed amended complaint on November 15, 1983, and when the stay was lifted in December of that year, the amended complaint was accepted for filing.

Discovery is well under way in this case. Plaintiff filed its first request for production of documents on August 1, 1984, and defendants have filed requests for production of documents and interrogatories. There are also discovery motions pending before this Court's magistrate.

It is defendants' contention that Section 3(a) of the Act should apply in spite of 3(b), arguing that, even though this is a 1978 case, it is still in an early stage of litigation because of the long stay and the appeals that have been had. Therefore, defendants argue, it would be inequitable not to apply the bar against antitrust damage awards from Section 3(a). Defendants also argue that plaintiff has alternative relief available, namely an injunction against all defendants and money damages from all of the other defendants.

Defendants further cite legislative history suggesting that one measure of an early stage of litigation is whether the case is still in discovery as opposed to a case that has already proceeded to judgment. They also cite a floor colloquy suggesting that a court might consider the existence or sufficiency of monetary damages from other defendants who would remain liable, and of injunctive relief as possible "alternative relief" that might be sufficient to invoke the Section 3(a) ban on the pending case. It is clear from the language of the Act that the burden is on the defendant to establish that Section 3(a) bars an action against local government pending at the time of enactment. The defendant has the burden of establishing the availability of alternative relief under the Clayton Act, and the inequitability of not applying Section 3(a) to the pending case. The

existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto is deemed prima facie evidence that the Section 3(a) ban should not apply.

The Court feels that the defendant has failed to meet this heavy burden imposed by the statute. First of all, there has been a district court judgment entered in this case. The fact that it was vacated does not take away from the fact that Judge Kennedy in 1979 granted a motion for summary judgment. It is further clear that, in light of the very checkered career of this case in the state courts of Michigan (*see* discussion in *Huron Valley Hospital, Inc. v. City of Pontiac*, 585 F. Supp. 1159 (E.D. Mich. 1984), and the determinations made by this Court in that opinion), the equities clearly do not favor application of the Section 3(a) bar to damages.

It is clear that the decision as to whether to apply the bar is to be made on a case-by-case basis, considering all of the factors that may be relevant. Even in this old case, there has been a lot of activity, and while it is true that there have been stays and delays in the litigation, that discovery is still under way, and that the final pretrial conference is not set until December 17, 1985, the case has been in the courts since 1978 and plaintiffs have not been dilatory or remiss in pursuing this litigation. Further, it is clear that injunctive relief against these hospital defendants would not be sufficient relief for allegations of antitrust and civil rights conspiracy dating back to 1978.

Those allegations are that the defendants who now seek summary judgment were involved in much more than simply carrying out their assigned duties on behalf of the public with certain unintended and consequential effects in restraint of trade, and, for the purpose of this motion, those allegations must be taken as true. Plaintiff has alleged that these defendants were instrumental in conspir-

ing with private parties and with agents of the state to deprive it of its right to due process of law, with the goal of stifling competition. Under these circumstances, defendants have failed to show that it would be inequitable not to apply the Section 3(a) bar on monetary damages and attorney fees.

Therefore, for the reasons stated, Section 3(a) of the Local Government Antitrust Act of 1984 will not be invoked.

All motions to dismiss and/or summary judgment are denied. Appropriate orders may be presented.

Horace W. Gilmore /s/
HORACE W. GILMORE
United States District Judge

DATED: June 17, 1985

PUBLIC ACTS 1972
No. 256

[No. 256.]

AN ACT to require certificates of need for new construction or conversion of, addition to or modernization of health facilities; to provide for the issuing of certificates of need; to establish a state health facilities commission; to provide fees and penalties; and to make appropriations.

The People of the State of Michigan enact:

331.451 Health facilities; definitions. [M.S.A. 14.1179(51)]

Sec. 1. As used in this act:

(a) "Addition" means adding patient rooms to a health facility or the adding of ancillary service areas or other accommodations resulting in a single project cost including construction, engineering and fixed equipment in excess of an amount which shall be determined by the director with the approval of the state health facilities commission.

(b) "Certificate of need" means a certificate attesting to need for new construction, or conversion of, addition to or modernization of a health facility.

(c) "Commission" means the state health facilities commission established by this act.

(d) "Consumer" means any individual not connected, directly, with any person, organization, corporation or institution associated with the provision of health care and services. A doctor; nurse; administrator or operator of a

hospital, nursing home or home for the aged; agent or employee of a health insurance provider; a pharmacist; or one who contracts to perform services for the foregoing is not a consumer.

(e) "Conversion" means converting an existing building not previously licensed as a health facility to such use or converting of an area of any other institution to health facility use.

(f) "Department" means the department of public health.

(g) "Director" means the director of the department of public health.

(h) "Health facility" means a hospital or any part thereof licensed by the department of public health in accordance with Act No. 17 of the Public Acts of 1968, being sections 331.411 to 331.430 of the Compiled Laws of 1948 or Act No. 263 of the Public Acts of 1913, as amended, being sections 331.401 to 331.406 of the Compiled Laws of 1948.

(i) "Modernization of the physical plant" means a major upgrading, alteration or change in function of any part or area of a health facility resulting in a single project cost including construction, engineering and fixed equipment in excess of an amount which shall be determined by the director with the approval of the state health facilities commission. Modernization shall not include normal maintenance and operational expenses.

(j) "New construction" means construction of a health facility where a health facility did not exist or construction as a replacement for an existing health facility.

(k) "Person" means an individual, copartnership, corporation, association, agency, organization or unit of government including any receiver, trustee or assignee thereof.

331.452 Commission; members, compensation; quorum; meetings. [M.S.A. 14.1179(52)]

Sec. 2. A state health facilities commission is created in the department of public health. The governor shall appoint the members with the advice and consent of the senate. The commission shall consist of 11 members, 6 of whom shall be designated in conformance with the requirements of Public Law 88-443. A majority of the members shall be consumers. Consumer members shall include 2 representatives from labor, 2 representatives from business and 3 representatives of the public. In appointing the first members of the commission, the governor shall designate 4 members for a term of 1 year, 4 members for a term of 2 years and 3 members for a term of 3 years. Thereafter, members shall be appointed for 3-year terms. A vacancy other than by expiration of term shall be filled by appointment by the governor with the advice and consent of the senate for the unexpired term. The members of the commission shall receive $40.00 per day for each full day while on commission business and $20.00 for each half day while on commission business and shall be reimbursed for actual expenses incurred in the performance of their official duties. Seven members constitute a quorum for the transaction of business. The chairman shall be elected annually by the members of the commission and shall be a consumer. The commission shall meet at the call of the chairman or the director and in any case at least twice a year.

331.453 Commission; duties. [M.S.A. 14.1179(53)]

Sec. 3. (1) The commission shall advise and consult with the director to implement the provisions of Act No. 17 of the Public Acts of 1968 and Act No. 299 of the Public Acts of 1947, as amended, being sections 331.501 to 331.516 of the Compiled Laws of 1948, and the requirements of Public Law 88-443.

(2) The commission shall review all applications for certificate of need denied by the director and shall conduct hearings when requested pursuant to this act. Decisions made by the commission are binding on the director.

331.454 Health facility; certificate of need; rules; reports; waiver. [M.S.A. 14.1179(54)]

Sec. 4. A health facility shall not be constructed, converted, added to or modernized subject to section 1 (i) without first obtaining a certificate of need which documents a demonstrated need and grants permission for the proposed project. The director shall promulgate rules, after prior consultation with local and regional health planning agencies and the concurrence of the state comprehensive health planning advisory council, subject to the approval of the commission, in accordance with and subject to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Compiled Laws of 1948, to provide for the issuance of certificates of need. The director shall submit periodic reports to the commission concerning certificates of need issued and the reasons for granting the certificate. A certificate of need shall be consistent with but need not necessarily follow exactly the state plan for hospital and medical facilities construction and the policies and procedures governing the issuance of certificates of need required for projects under federal grant-in-aid programs or federal loan guarantee programs. In in-

stances where a state or federal agency contracts with a health maintenance organization to render comprehensive health care services, a certificate of need may be waived for those inpatient and outpatient facilities that are necessary for the health maintenance organizations to achieve maximum effectiveness in rendering comprehensive health care services.

331.455 Certificate of need; application. [M.S.A. 14.1179(55)]

Sec. 5. Application for a certificate of need for new construction, conversion, addition to or modernization of a health facility, shall be made to the director on forms provided by him.

331.455a Application evaluation, factors and criteria. [M.S.A. 14.1179 (55a)]

Sec. 5a. In evaluating an application for a certificate of need, the commission shall take into account the following factors and criteria;

(a) The patterns and level of utilization, availability and adequacy of existing facilities, institutions, programs and services, in the immediate community and region concerned.

(b) The degree to which the residents and physicians of the immediate community and region concerned, are provided access to the services and programs of the health facility applying for the certificate of need.

(c) The availability, and adequacy and promotion of services such as pre admission, ambulatory or home care services which may serve as alternatives or substitutes for inpatient or resident care.

(d) The possible economies and improvement in service to be derived from consolidation of highly specialized health facility services and from the operation of cooperative or shared central services including but not limited to laboratory, radiology, pharmacy and laundry service.

(e) The possible economies and improvement in patient or resident care to be anticipated from affiliation or other contractual arrangements between facilities, institutions and service agencies and organization.

(f) The availability of manpower.

(g) That the health facility does not discriminate because of race, religion, color or national origin in any area of its operations including but not limited to employment, patient admission and care, room assignment, and professional and nonprofessional selection and training programs.

(h) In the case of a nonprofit hospital, that such health facility is in fact governed by a body which is composed of a majority consumer membership.

(i) The applicant's ability to finance the project for which the certificate of need is requested and ability to finance the operation of the health facility following completion of the project.

(j) Local and regional rules, regulations and standards adopted by the appropriate local and regional areawide comprehensive health planning agencies which reflect the conditions, problems and resources of the various areas represented by such agencies and which are not inconsistent with the foregoing criteria.

(k) Such other factors and criteria which contribute toward the orderly development of quality health care for all citizens.

331.456 Certificate, issuance; financial ability, recommendations, advice. [M.S.A. 14.1179(56)]

Sec. 6. Before issuing a certificate of need, the director shall take actions necessary to obtain all of the following:

(a) From the person applying for the certificate, evidence of his ability to finance the construction, conversion, addition or modernization project for which the certificate is requested and ability to finance the operation of the new, converted or modernized facilities following completion of the construction, conversion, addition or modernization.

(b) Recommendations from those local or regional area wide comprehensive health planning agencies designated by the office of comprehensive state health planning. Necessity for receiving the recommendations may be disregarded by the director when the recommendations are not provided within 30 days of written request for same. After receiving recommendations of the regional areawide comprehensive health planning agency or after expiration of the 30 days, the state department of public health shall act within 60 days. The applicant and the areawide planning agency shall be allowed to appeal a negative decision, based on causes shown by the department.

(c) Advice and counsel from the commission in those instances when local or regional areawide comprehensive health planning agency recommendations are not in agreement with the state plan for hospital and medical facilities construction prepared in accordance with Act No. 299 of the Public Acts of 1947, as amended.

331.457 Certificate; fee. [M.S.A. 14.1179(57)]

Sec. 7. The director shall require from the person applying for a certificate of need a fee in the amount of ½ of 1% of the estimated cost of the new construction, conversion, addition or modernization of the health facility including cost of construction, engineering and equipment, subject to section 1 (i). The fee shall not exceed $500.00 for 1 certificate.

331.458 Contested case; appeal. [M.S.A. 14.1179(58)]

Sec. 8. If when the person who applies for a certificate of need is aggrieved by the decision of the director or if the recommendation of the local planning council is not accepted then he or the local planning council may request a hearing to be conducted by the commission in accordance with and subject to Act No. 306 of the Public Acts of 1969, as amended. If the certificate of need is not granted by the commission or the person who applies for the certificate of need is aggrieved by the decision of the commission, then he or the local planning council may appeal to the circuit court of the county in which the appealing health facility is located requesting an order reversing the decision of the commission in the same manner as is provided for a civil suit.

331.459 Injunction; unlawful projects. [M.S.A. 14.1179(59)]

Sec. 9. Notwithstanding the existence and pursuit of any other remedy, in addition the commission or the director of public health may maintain an action in the name of the state for injunction or other process against any person to restrain or prevent the construction, conversion, addition or modernization project, as described in this act, without a certificate therefor or in a manner contrary to law.

331.460 Health facilities council; abolition; transfer. [M.S.A. 14.1179(60)]

Sec. 10. The state health facilities council as established under Act No. 17 of the Public Acts of 1968 is abolished and its functions, powers and duties are transferred to the state health facilities commission.

331.461 Appropriation. [M.S.A. 14.1179(61)]

Sec. 11. There is appropriated to the state department of public health from the general fund of the state for the fiscal year ending June 30, 1973, the sum of $60,000.00 or as much thereof as may be necessary to carry out the purposes of this act.

331.462 Effective date. [M.S.A. 14.1179(62)]

Sec. 12. This act shall not become effective unless and until House Bill No. 5574 of the 1971 regular session is enacted and becomes effective.

Approved August 8, 1972.

Public Acts 1975
No. 171

[No. 171]

AN ACT to amend section 5a of Act No. 256 of the Public Acts of 1972, entitled "An act to require certificates of need for new construction or conversion of, addition to or modernization of health facilities; to provide for the issuing of certificates of need; to establish a state health facilities commission; to provide fees and penalties; and to make appropriations," being section 331.455a of the Compiled Laws of 1970.

The People of the State of Michigan enact:

Section amended; health facilities.

Section 1. Section 5a of Act No. 256 of the Public Acts of 1972, being section 331.455a of the Compiled Laws of 1970, is amended to read as follows:

331.455a Application for certificate of need; evaluation; factors and criteria. [M.S.A. 14.1179(55a)]

Sec. 5a. In evaluating an application for a certificate of need, the director, the local and regional planning agency, and the commission shall take into account the following factors and criteria:

(a) The patterns and level of utilization, availability, and adequacy of existing facilities, institutions, programs, and services, in the immediate community and region concerned.

(b) The degree to which the residents and physicians of the immediate community and region concerned, are provided access to the services and programs of the health facility applying for the certificate of need.

(c) The availability, and adequacy and promotion of services such as preadmission, ambulatory, or home care services which may serve as alternatives or substitutes for inpatient or resident care.

(d) The possible economies and improvement in service to be derived from consolidation of highly specialized health facility services and from the operation of cooperative or shared central services including but not limited to laboratory, radiology, pharmacy, and laundry service.

(e) The possible economies and improvement in patient or resident care to be anticipated from affiliation or other contractual arrangements between facilities, institutions and service agencies and organization.

(f) The availability of manpower.

(g) That the health facility does not discriminate because of race, religion, color, national origin, age, or sex in any area of its operations including but not limited to employment, patient admission and care, room assignment, and professional and nonprofessional selection and training programs. The health facility governing body shall not discriminate in its selection and appointment of persons to the physician staff of the health facility or its training programs solely on the basis of the person's professional state licensure or registration or their professional education as doctors of medicine or doctors of osteopathy.

(h) In the case of a nonprofit hospital, that health facility is in fact governed by a body which is composed of a majority consumer membership.

(i) The applicant's ability to finance the project for which the certificate of need is requested and ability to finance the operation of the health facility following completion of the project.

(j) Local and regional rules, regulations and standards adopted by the appropriate local and regional areawide comprehensive health planning agencies which reflect the conditions, problems, and resources of the various areas represented by those agencies and which are not inconsistent with the foregoing criteria.

(k) Other factors and criteria which contribute toward the orderly development of quality health care for all citizens.

This act is ordered to take immediate effect.

Approved July 20, 1975.

Act 299, 1947, p. 468; Eff. Oct. 11.

AN ACT to provide for an inventory of existing hospitals, for a survey of the need for additional hospital facilities, and for the development and administration of a hospital construction program which will, in conjunction with existing facilities, afford hospitals adequate to serve all the people of the state; to provide for compliance with the requirements of the federal hospital survey and construction act and regulations thereunder; to create an office of hospital survey and construction, and to prescribe its powers and duties; to create the Michigan advisory hospital council, and to prescribe its powers and duties; to prescribe penalties; and to make appropriations to carry out the provisions of this act. Am. 1948, Ex. Ses., p. 23, Act 14, Imd. Eff. Apr. 28.

The People of the State of Michigan enact:

PART A—GENERAL

331.501 Michigan hospital survey and construction act; short title.

Sec. 1. This act may be cited as the "Michigan hospital survey and construction act."

331.502 Michigan hospital survey and construction act; definitions.

Sec. 2. As used in this act:

(a) "The federal act" means Public Law 725 of the 79th Congress, approved August 13, 1946, known as the hospital survey and construction act.

(b) "The surgeon general" means the surgeon general of the public health service of the United States.

(c) "Hospital" includes public health centers and general, tuberculosis, mental, chronic disease, and other types of hospitals, and related facilities, such as laboratories, out-patient departments, nurses' home and training facilities, and central service facilities operated in connection with hospitals, but does not include any hospital furnishing primarily domiciliary care.

(d) "Public health center" means a publicly owned facility for the provision of public health services, including related facilities such as laboratories, clinics, and administrative offices operated in connection with public health centers.

(e) "Non-profit hospital" means any hospital owned and operated by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

331.503 Office of hospital survey and construction; establishment; director, appointment, salary; purposes.

Sec. 3. There is hereby established in the executive branch of the state government an office of hospital survey and construction, which shall be administered by a full-

time salaried director appointed by the governor, to serve at the pleasure of the governor. This office shall constitute the sole agency of the state for the purpose of (1) making an inventory of existing hospitals, surveying the need for construction of hospitals, and developing a program of hospital construction as provided in Part B of this act, and (2) developing and administering a state plan for the construction of public and other non-profit hospitals as provided in Part C of this act.

331.504 Office of hospital survey and construction; authority of director.

Sec. 4. In carrying out the purposes of this act, the director is authorized and directed:

(a) To require such reports, make such inspections and investigations and prescribe such regulations as he deems necessary.

(b) To provide such methods of administration and personnel, and take such other action as may be necessary to comply with the requirements of the federal act and the regulations thereunder;

(c) To procure in his discretion the temporary or intermittent services of experts or consultants or organizations thereof, by contract, when such services are to be performed on a part-time or fee-for-service basis and do not involve the performance of administrative duties;

(d) To the extent that he considers desirable to effectuate the purposes of this act, to enter into agreements for the utilization of the facilities and services of other departments, agencies, and institutions, public or private. Insofar as is practical, the services of the buildings and construction division of the state administrative board shall

be used in the performance of the duties as set forth by this act.

(e) To make an annual report to the governor and to the legislature on activities and expenditures pursuant to this act, including recommendations for such additional legislation as the director considers appropriate to furnish adequate hospital, clinic, and similar facilities to the people of this state.

331.505 Office of hospital survey and construction; application for federal funds, deposit, expenditure, repayment of unexpended funds; gifts, grants.

Sec. 5. The state budget director is authorized to make application to the surgeon general for federal funds to assist in carrying out the survey and planning activities herein provided. Such funds shall be deposited in the state treasury and shall be available to the office of hospital survey and construction for expenditure in carrying out the purposes of this act in such manner as is or may be provided by law. Any such funds received and not expended for such purposes shall be repaid to the treasury of the United States. The state budget director is further authorized to accept on behalf of the state and to deposit with the state treasurer, to be credited to the hospital construction and planning fund, any grant, gift or contribution made to assist in meeting the cost of carrying out the purposes of this act.

331.506 Michigan advisory hospital council; creation, appointment, duties, qualifications, terms, expenses, quorum, chairman.

Sec. 6. The Michigan advisory hospital council is created to advise and consult with the director in carrying out the provisions of this act. The governor shall appoint

the members of the council, with the advice and consent of the senate. The council consists of 12 members, designated in conformance with the requirements of Public Law 443, 88th congress. The first appointments shall be made as far as possible from current members of the Michigan advisory hospital council. In appointing the first members of the council the governor shall designate 3 members for a term of 1 year, 3 members for a term of 2 years, 3 members for a term of 3 years, and 3 members for a term of 4 years. Thereafter, members shall be appointed for a term of 4 years. All vacancies occurring on the council shall be filled by appointment by the governor for the unexpired term.

The members of the council shall serve without compensation but shall be reimbursed for actual expenses incurred in the performance of their official duties. Seven members shall constitute a quorum for the transaction of business. The chairman shall be elected by the members of the council. The chairman shall be an ex officio member of the state council of health with the right to vote. The advisory council shall meet at the call of the chairman or at its own direction, and in any case at least once a year.

331.507 Appropriation of state and federal funds.

Sec. 7. For the purposes of administering the provision of this act, there is hereby appropriated from the general fund of the state the sum of $25,000.00, and also such funds as may be received from the federal government and other sources for such purposes.

PART B—SURVEY AND PLANNING

331.508 Inventory and survey of hospitals; construction program.

Sec. 8. The director is authorized and directed to make an inventory of existing hospitals, including public, non-profit and proprietary hospitals, to survey the need for construction of hospitals, and, on the basis of such inventory and survey, to develop a program for the construction of such public and other non-profit hospitals as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate hospital, clinic and similar services to all the people of the state.

331.509 Hospital construction program; adequate facilities.

Sec. 9. The construction program shall provide, in accordance with regulations prescribed under the federal act, for adequate hospital facilities for the people residing in this state and insofar as possible shall provide for their distribution throughout the state in such manner as to make all types of hospital service reasonably accessible to all persons in the state.

PART C—HOSPITAL CONSTRUCTION PROGRAM

331.510 Hospital construction program; state plan, contents, submission to surgeon general, hearing, approval, publication, review, modification.

Sec. 10. The director shall prepare and submit to the surgeon general a state plan which shall include the hospital construction program developed under Part B of this act, and which shall provide for the establishment, admin-

istration, and operation of hospital construction activities in accordance with the requirements of the federal act and regulations thereunder. The director shall, prior to the submission of such plan to the surgeon general, give adequate publicity to a general description of all the provisions proposed to be included therein, and hold a public hearing at which all persons or organizations with a legitimate interest in such plan may be given an opportunity to express their views. After approval of the plan by the surgeon general, the director shall publish a general description of the provisions thereof in at least 1 newspaper having general circulation in each county in the state, and shall make the plan, or a copy thereof, available upon request to all interested persons or organizations. The director shall from time to time review the hospital construction program and submit to the surgeon general any modifications thereof which he may find necessary and may submit to the surgeon general such modifications of the state plan, not inconsistent with the requirements of the federal act, as he may deem advisable.

331.511 Hospital construction program; minimum standards for maintenance and operation of hospitals receiving federal aid; medical personnel.

Sec. 11. Any hospital which shall hereafter receive federal aid under the provisions of Public Law 725, known as the "hospital survey and construction act" enacted by the 79th Congress, shall hereafter comply with the minimum standards of maintenance and operation which the state department of health with the advice of the advisory council, shall promulgate and administer. This section shall not be construed so as to authorize any regulation of medical personnel.

331.511a Minimum standards violation; penalty.

Sec. 11a. Any such hospital or person acting in behalf of such hospital violating these minimum standards of maintenance and operation shall be guilty of a misdemeanor, and upon conviction shall be fined not more than $100.00 for the first offense and not more than $200.00 for each subsequent offense, and each day of a continuing violation after conviction shall be considered a separate offense.

331.512 Construction projects; relative needs, federal regulations, priority.

Sec. 12. The state plan shall set forth the relative need for the several projects included in the construction program determined in accordance with regulations prescribed pursuant to the federal act, and provide for the construction, insofar as financial resources available therefor are certified by the state budget director, and for maintenance and operations and make possible in the order of such relative need.

331.513 Construction projects; application, submittance to director, conformity with federal or state requirements.

Sec. 13. Applications for hospital construction projects for which federal funds are requested shall be submitted to the director and may be submitted by the state or any political division thereof or by any public or non-profit agency authorized to construct and operate a hospital. Each application for a construction project shall conform to federal and state requirements.

331.514 Construction projects; hearing on application, approval, recommending and forwarding to surgeon general.

Sec. 14. The director shall afford to every applicant for a construction project an opportunity for a fair hearing. If the director, after affording reasonable opportunity for development and presentation of applications in the order of relative need, finds that a project application complies with the requirements of section 13 of this act and is otherwise in conformity with the state plan, he shall approve such application and shall recommend and forward it to the surgeon general.

331.515 Construction projects; inspection, certification, federal installment payments.

Sec. 15. From time to time the director shall inspect each construction project approved by the surgeon general, and, if the inspection so warrants, the director shall certify to the surgeon general that work has been performed upon the project, or purchases have been made, in accordance with the approved plans and specifications, and that payment of an installment of federal funds is due to the applicant.

331.516 State budget director; authorization to receive federal funds; hospital construction planning fund, deposit, disbursement.

Sec. 16. The state budget director is hereby authorized to receive federal funds in behalf of applicants and to authorize the director of the division of hospital survey and construction to transmit them to such applicants. There is hereby established, separate and apart from all public moneys and funds of this state, a hospital construction and

planning fund. Money received from the federal government for a construction project approved by the surgeon general shall be deposited to the credit of this fund and shall be used solely for payments due applicants for work performed, or purchases made, in carrying out approved projects.